

Honolulu High-Capacity Transit Corridor Project Alternatives Analysis

Technical Memorandum #13 Trip Report – May 15 & 16, 2007

May 25, 2007

Prepared for:
City and County of Honolulu

by:
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under subcontract to:
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From: Donald R Durkee
To: Mark Scheibe, PBQD

Subject: TRIP REPORT

Dates: May 15-16, 2007
Location: Honolulu HI

Matter: Honolulu High Capacity Transit Corridor Project ("Project")
Contract F54306 Task 2.3

Purpose. To meet with staff of the Departments of Transportation Services and the Corporation Counsel (COR) to gain understanding of the overall Project, and to explore specific aspects of the Project where DTS and COR may seek assistance in understanding applicability of FTA policies, procedures and practices in order to retain eligibility of the Project for federal financial assistance as implementation of the Project advances through the FTA New Starts process.

Honolulu Department of Transportation Services (DTS). May 15, 2:30 pm to 5:30 pm, Meeting with Mr. Kenneth Toru Hamayasu, Chief, Transportation Planning Division, and Ms. Phyllis Kurio, Transportation Planner.

Ms. Kurio provided an overview of the Project with accompanying maps of the anticipated alignment and a chart showing the schedule for a City-funded initial construction (attachments). The Project has advanced through most of the FTA Alternatives Analysis phase, including selection of a Locally Preferred Alternative.¹ The Project must now progress through required environmental reviews resulting in Draft and Final Environmental Impact Statements (EIS), prerequisite to FTA issuance of an environmental Record of Decision (ROD) and receiving FTA authorization to advance the Project into the Preliminary Engineering (PE) phase.²

Incurrence of Cost. To maintain eligibility for Federal funding, all costs incurred in carrying out the Project through the phases of the FTA New Starts process must be authorized by FTA in advance of their incurrence. Except where there is documentation evidencing so-called pre-award authority, no costs incurred prior to award of a grant by FTA and included under an approved project budget are eligible for Federal assistance. Moreover, improper incurrence of costs could jeopardize eligibility of the entire project for New Starts funding. DTS would like a technical memorandum prepared setting forth a discussion of what constitutes "incurrence of cost" under an FTA grant or pre-award authority.

¹ At this time the LPA addresses the Project alignment. Additional analyses will be undertaken as part of the environmental review resulting in selection of vehicle technologies on the alignment.

² DTS has the option to seek authorization to enter New Starts PE following completion of the Draft EIS or prior to completion of the Final EIS.

Procurement of Professional Services for PE-EIS. In addition to the requirement that incurrence of costs must have prior FTA authorization, Council of Environmental Quality (CEQ) regulations and guidance prohibit any firm or individual involved in preparation of the EIS from having any financial interest in the project during the period the firm or individual is working on the EIS. DTS would like a technical memorandum setting forth the applicable rules along with recommendations for structuring a solicitation for acquiring Professional Services necessary to complete the EIS and other project work without jeopardizing project eligibility.³ As part of the technical memorandum, DTS would like a letter drafted to FTA informing them of the procurement approach.

Department of Hawaiian Home Lands (DHHL). Mr. Hamayasu indicated that DTS is in discussions whereby the City would acquire title to certain property along the alignment controlled by the US Department of Interior in exchange for other properties controlled by the City. As FTA rules prohibit acquisition of right-of-way for a project prior to completion of the EIS and issuance of the ROD, except in certain limited cases, it was suggested that the City not enter into any formal agreement with DHHL prior to the issuance of the ROD. The City could consider entering into a contingent agreement contingent upon the ROD but it was suggested that DTS speak to FTA about the potential acquisition prior to finalizing any arrangement that could violate the FTA rule.

Design-Build for a Phase 1. Honolulu's Mayor has apparently made a public commitment to break ground on the project in 2009. It is unlikely that the project will have been authorized by FTA to advance into Final Design (FD) and into Construction by that time. Therefore, DTS is considering implementing the alignment into two phases. Following completion of the EIS and issuance of a ROD for the MOS, a contract would be awarded for the first phase, to be implemented using a design-build method of procurement, without FTA funds. The remainder would be built using a traditional design-bid-build method of procurement following FTA authorization to advance the project through FD and Construction and execution of a Full Funding Grant Agreement (FFGA).

This approach raises several issues that need to be addressed including: 1) final definition of the "Project" for purpose of the FFGA and eligibility of Phase 1 costs for Federal participation; 2) segmentation issues under Federal case law that might Federalize Phase 1 thereby possibly tainting the entire project as ineligible for Federal financial assistance, and 3) applicability of US DOT's Disadvantaged Business Enterprise (DBE) rule in absence of Federal funding for Phase 1. No technical memoranda were requested at this time for the issues raised concerning this approach.

Disadvantaged Business Enterprise. Honolulu's responsibility for compliance with US DOT DBE regulations differs from most recipients of FTA assistance due to the Ninth Circuit Court of Appeals decision in the case of *Western States Paving Co. v. United States and Washington State Department of Transportation* which applies only to

³ FTA has provided pre-award authority only for that degree of PE required for preparation of the EIS. DTS must receive additional written FTA authority to advance the project into New Starts PE beyond that required for preparation of the EIS.

grantees within the Ninth Circuit. U.S. DOT has issued guidance on how to proceed in light of the case. No technical memorandum was requested at this time but it was stated that one may be requested in the future.

Honolulu Department of the Corporation Counsel (COR). May 16, 10:00 am to 12 noon, Meeting with Ms. Kurio, DTS, Ms. Donna M. Woo, First Deputy Corporation Counsel, Mr. Reid M. Yamashiro, Deputy Corporation Counsel, and Mr. Don S. Kitaoka, Deputy Corporation Counsel.

Purpose. COR is responsible for providing legal services and advice to DTS in all phases of the Project. Ms. Woo, Mr. Yamashiro, and Mr. Kitaoka are the in-house legal team assigned to support DTS and the Department of Planning and Permitting (Project TOD issues). COR does not have extensive experience with FTA laws and regulations in general, nor with the FTA New Starts process in particular. They intend to seek outside public transportation (transit) legal expertise to assist them in this effort.

I was asked to provide an overall framework for the Project in context of FTA statutes, regulations and guidance to facilitate preparation of an OCC solicitation and to better orient the OCC team to FTA. We discussed broadly applicable statutory and regulatory requirements specified in the FTA Master Agreement as well as FTA Guidance in the form of Circulars and Federal Register Notices; in particular, the Common Grant Rule 49 CFR Part 18, the Joint FTA/FHWA Planning regulations, Council on Environmental Quality regulations, and FTA Circulars and Notices concerning New Starts, Full Funding Grant Agreements, Joint Development, Buy America, etc. We also touched on the issues of segmentation, minimal operable segments, and disadvantaged business enterprise regarding the City-funded initial segment. I informed the COR team how to access all materials discussed through the FTA web site www.FTA.DOT.GOV. No technical memorandum was requested at this time but it was stated that one may be requested in the future.